Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1382

JACK B. BALLARD - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	PAGE
Authorities	ii
Opinions Below	1– 2
Jurisdiction	2
Question Presented	2
Statutes and Criminal Rule Involved	2– 4
Statement of the Case	4– 7
Reasons for Granting the Writ	8–14
Conclusion	15

AUTHORITIES

Statutes:

Federal Statutes: PAGE

26 U.S.C. Sec. 7203 ..... 2– 3
26 U.S.C. Sec. 7206 ..... 3, 4

Criminal Rule:

Fed. Rules Cr. Proc., rule 33, 18 U.S.C. 2, 3–4, 7, 12

Cases:

Berry v. State, 10 Ga. 511, 527 11
United States v. McColgin, 535 F. 2d 471 11
United States v. Ward, 544 F. 2d 975 11
United States v. Frye, 548 F. 2d 765 11
Larrison v. United States, 24 F. 2d 82 12
Newman v. United States, 238 F. 2d 861 12
Gordon v. United States, 178 F. 2d 896 12
2 Wright, Federal Practice and Procedure, Sec. 557 13
United States v. Hiss, 107 F. Supp. 128, affirmed on opinion below, 201 F. 2d 372 14
United States v. Austin, 387 F. Supp. 540 14
Mesarosh v. United States, 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 1 14

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v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Jack B. Ballard, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on February 3, 1978.

OPINIONS BELOW

The Order and Opinion of the Court of Appeals in the instant action, entered on February 3, 1978 (Appendix A) is not officially reported. The Order of the Court of Appeals overruling petitioner's Petition for Rehearing was entered on February 27, 1978 (Appendix B). The Mandate herein was issued on March 7, 1978 (Appendix C). The Order and Opinion of the

Court of Appeals, entered on April 28, 1976 in petitioner's direct appeal (Appendix D) is reported at 535 F. 2d 400.

JURISDICTION

The Order of the Court of Appeals for the Eighth Circuit (Appendix A) was entered on February 3, 1978; and a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Eighth Circuit (Appendix B) on February 27, 1978, the mandates being issued on March 7, 1978 (Appendix C).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

I. Whether petitioner's post-conviction motion based on newly discovered evidence under Fed. R. Crim. Proc. 33 should have been sustained where the undisputed evidence strongly indicated that petitioner might have been convicted by perjured testimony unexpectedly given at trial by a material government's witness.

STATUTES AND CRIMINAL RULE INVOLVED

Statutes of the United States

Title 26, United States Code

Sec. 7203 Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a

return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Sec. 7206. Fraud and False statements.

Any person who—

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fed. Rules Cr. Proc.

Rule 33, New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evi-

dence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

After a five-day jury trial, April 14-18, 1975, petitioner Ballard was found guilty in the district court of a two-count indictment charging violations of sec. 7206(1) of Title 26, United States Code, in that he "did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar" years 1969 (count 1) and 1970 (count 2), "which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported gross income from wages" in certain amounts, "whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated."

The jury deliberated for 9 and a half hours before returning its guilty verdict. During the deliberations the jury requested the trial court to clarify a certain portion of petitioner's testimony in reference to one of the most significant issues in the case, but the trial judge denied that request.

The government presented 48 witnesses plus a great amount of documentary evidence. Petitioner testified in his own behalf and presented two other defense witnesses.

Essentially, the evidence showed that during 1969 and 1970 several businesses had paid petitioner for various services and goods and that petitioner had neglected to pay income tax on the payments received. Petitioner's defense was that, since he was honestly unaware of the requirement of listing business losses on a Schedule C form, he lacked specific intent to break any of the internal revenue laws.

All of the government's witnesses, save one, testified that the transactions in issue had been consumated by check in a routine business fashion. The exception was Jasper Cillo, a St. Louis businessman who incidentially is himself presently under a multi-count indictment for allegedly stealing from the city by falsifying expenses.

Mr. Cillo was the most damaging government's witness. He testified that he had leased certain property from petitioner for a four-month period and that he had paid petitioner the monthly rent payments in cash rather than by checks.

As stated, the jury reached a guilty verdict after nine and one half hours of deliberations. On August 7, 1975, the trial court formally sentenced petitioner to a three-year prison term on each count, to run concurrently, and a $2,000 fine on each count, to be cumulative for a total fine of $4,000.

Petitioner then filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit.

On April 28, 1976, a panel of the Court of Appeals filed an opinion (Appendix D) affirming petitioner's conviction as to count 1 but reversing and remanding as to count 2. The Court of Appeals decided that the failure of the district court to give an instruction that the jury must consider cost of goods sold was not prejudicial as to 1969, but such omission was prejudicial as to 1970 and constituted plain error. Petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing in banc, but same was denied on June 2, 1976.

Seeking a review of that denial, petitioner filed a petition for a writ of certiorari in this Court. On November 1, 1976, this Court denied petitioner's application for certiorari relief.

Complying with the orders from the sentencing court petitioner surrendered himself to the superintendent of the United States Medical Center at Springfield, Missouri on November 26, 1976, to begin service of his sentence.

Shortly following his commitment to the Medical Center, petitioner, for the very first time, discovered that the government's witness Cillo had been interviewed by a St. Louis *Post-Dispatch* newspaper reporter prior to trial and that a subsequently appearing article quoted Cillo as having made certain statements which were in direct contradiction with his trial testimony. Petitioner, as soon as was possible, secured a copy of the said newspaper article from the offices of the *Post-Dispatch* (Appendix E).

Next, petitioner hired an investigative firm for the purpose of interviewing the witness Cillo. During the

attempted interview Mr. Cillo was reluctant to speak with the investigator, saying that if he were to talk with the investigator, he would "liable to perjure" himself (Appendix F).

Petitioner, using the newspaper article and investigative report as exhibits, filed pro se with the district court a motion for new trial pursuant to Fed. Rules Cr. Proc. rule 33 wherein he alleged that Mr. Cillo's testimony was false and that it resulted, or at least might have resulted, in petitioner's conviction, thus being valid grounds for a new trial or alternatively for an evidentiary hearing on the motion. The trial court, however, summarily overruled this motion. Notice of Appeal was timely filed and an appeal to the Eighth Circuit Court of Appeals was duly perfected.

On February 3, 1978, The Court of Appeals affirmed the lower court's decision (Appendix A). Petitioner sought a rehearing or hearing in banc, but that petition too was denied (Appendix B). The Court of Appeals' mandate was issued on March 7, 1978 (Appendix C).

This petition for a writ of certiorari seeks to review the judgment of the Eighth Circuit Court of Appeals affirming the district court's denial of petitioner's motion for new trial under rule 33, Fed. Rules Cr. Proc.

REASONS FOR GRANTING THE WRIT

1. The petitioner's post-conviction motion for new trial, based on the ground of newly discovered evidence, should have been sustained in that his conviction was obtained by perjured testimony surprisingly given at trial by a prosecution witness who was the strongest link in the government's otherwise weak case.

2. This Court now has the opportunity to resolve the apparent conflict among the Courts of Appeals regarding the important legal question presented herein.

I.

The pertinent part of the false testimony given by government witness Jasper Cillo was as follows (Appendix G):

Q. Now, have you ever had occasion to rent any property from Mr. Ballard?

A. Yes, sir, I rented a piece of property on 3901 North Broadway.

Q. Do you recall what the months were that you rented it?

A. It was in—I rented it for four months in 1969 and 1970.

Q. Do you recall what the months were that you rented it?

A. October, November, December, and then right into '70—or in November, right in through there.

Q. To whom did you pay the rental on that property?

A. To Mr. Ballard.

Q. In what form did you pay that rental?

A. Cash.

Q. What was the amount of the rental?

A. Four-hundred and twenty-five dollars a month.

Q. How often did you pay this cash to Mr. Ballard?

A. The first day of every month.

Q. For the four months that you have indicated?

A. Right.

Q. To whom would you deliver the money?

A. To Mr. Ballard.

* * *

Q. Is that the affidavit that you gave to the Internal Revenue Service?

A. Yes, sir.

Q. And at the time you gave that affidavit, I'd like to ask you—have you look at that affidavit and see if that refreshes your recollection as to when you commenced renting this property.

A. Yes, sir, this is the exact year, November to February. I'm just away by one month. It was four months total.

Mr. Cillo's testimony, above quoted, was false. It was not only material but was clearly the strongest and most damaging element in the government's case against petitioner. The testimony came as a total surprise to petitioner, and he therefore was unable to meet it at trial. The jury would have "probably" or at least "might have" reached a different result without this perjurious testimony.

Cillo was the only witness who claimed to have dealt with petitioner in cash. The other government witnesses who had similarily conducted business with peti-

tioner testified that all transactions had been consummated by checks. Introduction of evidence showing receipt of cash income would have, to the average juror in a tax case, implications far more serious than introduction of evidence revealing income derived solely from payments made by checks.

Cillo's was the only testimony concerning rent payments received by petitioner. The other evidence was connected with services performed or goods sold.

Cillo testified that he had paid petitioner four months rental, while petitioner himself testified that he received only two months rental from Mr. Cillo. This contradiction was plainly fatal to petitioner in that it had the effect of undermining his testimony as a whole. The jury had every right to believe Cillo over petitioner on the theory that petitioner, to save his own skin, was probably the one who was lying.

Petitioner has presented sufficient evidence demonstrating the falsity of Cillo's testimony. The newspaper article (Appendix E), together with the investigative report (Appendix F), leaves no other conclusion but that Cillo outright lied at petitioner's trial. It should be noted that Cillo's statements which appeared in the newspaper article were consistent with petitioner's trial testimony. It is therefore obvious that Cillo maliciously changed his trial testimony in order to help convict petitioner. The investigative report (Appendix F) is further bona fide evidence that Cillo's trial testimony was false. The report reveals that Cillo, refusing to talk with the investigator, nevertheless went on to make the comment that "if I talk to you, you're liable to consider or *I'm liable to perjure myself.*"

Petitioner had no forewarning that Mr. Cillo intended to testify falsely and of course he was unprepared to cope with the surprise testimony. Only after petitioner was committed to prison did he learn of the existence of the newspaper article and ever since then he has diligently pursued all avenues for relief.

The fact that the jury deliberated for nine and a half hours lends credence to petitioner's argument that the government's case was weak to begin with. Mr. Cillo's false testimony, plainly the most prejudicial evidence against petitioner, was probably the determining factor in the jury's verdict. Petitioner contends now, as he did below, that without Cillo's perjurious testimony he would have probably avoided, or at least might have avoided, a conviction. In view of the foregoing, the Court of Appeals was in plain error in affirming the district court's denial of petitioner's rule 33 motion.

II.

The decision reached in this case by the Court of Appeals for the Eighth Circuit is in direct conflict with existing case law from the Court of Appeals for the Seventh Circuit. This Court should take this opportunity to resolve that conflict.

In 1851 the first precedent involving the legal question presented in the proceeding was established in *Berry* v. *State,* 10 Ga. 511, 527. The Eighth Circuit Court of Appeals has repeatedly applied the Berry rationale in deciding similar cases. See *United States* v. *McColgin,* 535 F. 2d 471; *United States* v. *Ward,* 544 F. 2d 975; *United States* v. *Frye,* 548 F. 2d 765.

On the other hand, the Seventh Circuit Court of Appeals has a completely different rationale for such cases. See *Larrison* v. *United States,* 24 F. 2d 82.

In the Eighth Circuit the law appears to be that a trial court should grant a post-conviction motion for new trial under rule 33, Fed. Rules Cr. Proc., only when the court is reasonably well satisfied that the evidence (1) is in fact newly discovered, i.e., discovered since the trial; (2) could not with due diligence have been discovered earlier; (3) is not merely cumulative or impeaching; (4) is material to the issues; and finally, (5) is such, and of such nature, that upon a retrial it *would probably produce* an acquittal.

In the Seventh Circuit Court of Appeals a different and less-stringent rule is the law. There it is found that a new trial under rule 33 should be granted where (1) the court is reasonably well satisfied that the testimony given by the material witness was false; (2) that without it the jury *might have reached* a different conclusion; and (3) that the party seeking the new trial was taken by surprise when the false testimony was given, and was unable to meet it or did not know of its falsity until after the trial. At least two other Courts of Appeals support the Seventh Circuit's reasoning. See *Newman* v. *United States,* 238 F. 2d 861 (5th Cir. 1956); *Gordon* v. *United States,* 178 F. 2d 896 (6th Cir. 1949).

On appeal petitioner urged the Eighth Circuit to decide his case under the Larrison standards as set forth by the Seventh Circuit. Petitioner argued that the five-prong test usually applied by the Eighth Circuit should not be applicable in his case because of the more serious nature of the newly discovered evidence, namely, perjured testimony.

The Eighth Circuit, however, in its written Order and Opinion (Appendix A) was careful to avoid a direct and published rejection of the Larrison rule. Instead the Court of Appeals applied its five-prong test which was formulated for typical claims of newly discovered evidence, even though perjured testimony was the legal issue. Clearly, a conflict between the Eighth and Seventh Circuits exists.

In 2 Wright, Federal Practice and Procedure, Sec. 557, p. 525, the law in this area for *all* circuits is clearly and unequivocally stated:

> If the motion [rule 33] . . . rests . . . on the ground that testimony at the trial was false, what is known as the "Larrison rule" applies. This is that three requirements must be met before such a motion will be granted:
>
> (a) The Court is reasonably well satisfied that the testimony given by a material witness was false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it for it did not know of its falsity until after the trial.

The erroneousness of the Court of Appeals' decision lies in the test that was applied. Since the case involved the grave allegation of perjured testimony, as opposed to a general claim of newly discovered evi-

dence, the Court of Appeals should have applied the Larrison rule. There is a vast difference between evidence that "would probably" produce an acquittal on retrial and testimony that "might have" contributed to the conviction. See *United States* v. *Hiss,* 107 F. Supp. 128, affirmed on opinion below, 201 F. 2d 372.

In deciding a case similar to the case at hand one district court judge, Judge Van Dusen of the eastern district of Pennsylvania, went so far as to grant a new trial to a defendant on the ground that it was *possible* that the perjured testimony contributed to the conviction.

It was recognized in a more recent case, *United States* v. *Austin,* 387 F. Supp. 540, that "a motion for new trial on the basis of false testimony at trial must satisfy the requirements of the so-called 'Larrison rule'."

From the foregoing it is apparent that a conflict in decisional law between the Seventh and Eighth Circuit Courts of Appeals exists. In the interest of decision making and to accommodate diversities and conflicts occurring among the various Courts of Appeals, this Court should grant review in the present case. As things stand now, the dignity of the United States Government has been offended. It has allowed a person, petitioner Ballard, to be convicted on tainted testimony. *Mesarosh* v. *United States,* 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 1.

CONCLUSION

Because of the reasons advanced above it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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March 28, 1978